No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF THE ARGUMENT 2

BACKGROUND 3

ARGUMENT 6

I. The Tenth Circuit's Ruling Gives Shelter to Blatant Religious Discrimination 6

II. The Tenth Circuit's Ruling Ignores the Reality of the Human Condition 9

III. The Tenth Circuit's Ruling Ignores the Important Role that Religion Plays in American Society, Including in the Workplace 13

CONCLUSION 17

TABLE OF AUTHORITIES

CASES	PAGE(S)
Burwell v. *Hobby Lobby*, 134 S. Ct. 2751 (2014)	1
Cantwell v. *State of Connecticut*, 310 U.S. 296 (1940)	14
Dixon v. *Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010)	6
Holt v. *Hobbs*, No. 13-6827 (argued Oct. 7, 2014)	1
Hood v. *Oliva*, 226 F.3d 198 (3d Cir. 2000)	1
Hosanna-Tabor Evangelical Lutheran Church & School v. *EEOC*, 132 S. Ct. 694 (2012)	1
Lynch v. *Donnelly*, 465 U.S. 668 (1984)	14
Rigdon v. *Perry*, 962 F. Supp. 150 (D.D.C. 1997)	2
Thomas v. *Review Board*, 450 U.S. 707 (1981)	13
Tong v. *Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2014)	1
Young v. *United Parcel Service, Inc.*, No. 12-1226 (argued Dec. 3, 2014)	9
Zorach v. *Clauson*, 343 U.S. 306 (1952)	14

STATUTES

42 U.S.C. § 2000e 4

42 U.S.C. § 2000e-2 4

OTHER AUTHORITIES

12 *Journals of the Continental Congress* (Worthington Chauncey Ford ed., 1908) (Oct. 1778) 15

Alexis de Tocqueville, I *Democracy in America* (Henry Reeve trans., 1899) (1835) 16

EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008) 6

Frank Newport, "Mississippi Most Religious State, Vermont Least Religious." (Feb. 3, 2014), *available at* http://www.gallup.com/poll/167267/mississippi-religious-vermont-least-religious-state.aspx 11, 12

Frank Newport, "State of States: Importance of Religion" (Jan. 28, 2009), *available at* http://www.gallup.com/poll/114022/state-states-importance-religion.aspx 12

Gallup, Religion (2013), *available at* http://www.gallup.com/poll/1690/religion.aspx 11

Homo Religiosus? Debating the Naturalness of Religion and the Anthropological Foundations of Religious Freedom (Timothy Samuel Shah, ed.) (forthcoming 2016) 9, 10, 15

Letter from Benjamin Franklin to the Abbés Chalut and Arnaud (April 17, 1787) *in* 9 *The Writings of Benjamin Franklin*, at 569 (Albert Henry Smyth ed. 1906) 15

Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 Works of John Adams, at 229 (Charles Francis Adams ed. 1854) 16

Pew Forum on Religion and Public Life, The Global Religious Landscape (2010), *available at* http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/ 11

Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf 11

Steve Crabtree, "Religiosity Highest in World's Poorest Nations." (August 31, 2010), *available at* http://www.gallup.com/poll/142727/religiosity-highest-world-poorest-nations.aspx 11

Tanenbaum, What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion (Mar. 2013), *available at* https://tanenbaum.org/publications/2013-survey/ 12

The International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) 14

U.S. Equal Employment Opportunity Commission. Religion-Based Charges, FY 1997 – FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm 13

INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest law firm that protects the free exercise of religion by persons of all faiths. Agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, Zoroastrians, and many others have all been defended by the Becket Fund in lawsuits ranging across the country and around the world.

The Becket Fund's representation of this broad array of religious believers is fueled by its belief that the religious impulse is inherent in all human beings and that religious expression is natural and inevitable in all aspects of human life. Thus, preserving a broad right for all sincere believers to freely exercise their religion—in private and in public—is essential to upholding both individual human dignity and the moral foundations that support a free society.

In pursuit of this mission, the Becket Fund has defended—both as primary counsel and as *amicus curiae*—the free exercise of religion within the ministry, *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694 (2012); in the workplace, *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751 (2014); in prison, *Holt* v. *Hobbs*, No. 13-6827 (argued Oct. 7, 2014); in public places, *Tong* v. *Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2014); in schools, *Hood* v. *Oliva*, 226 F.3d 198 (3d Cir. 2000); in the military,

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[1] No party's counsel authored any part of this brief. No person other than the *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

Rigdon v. *Perry*, 962 F. Supp. 150 (D.D.C. 1997); and in numerous other public and private settings.

Here, the Becket Fund is concerned that the Tenth Circuit's decision creates an opening for blatant religious discrimination in employment and unnecessarily penalizes religious exercise in the workplace, even where it would have no meaningful impact on an employer's business. The ruling below contributes to the marginalization of religion in public life by imposing a presumption that employees are nonreligious unless they explicitly announce otherwise, essentially creating a standard of "protection upon request only" that erodes the important role that religion plays in society.

SUMMARY OF THE ARGUMENT

This case is about the baseline assumptions the law applies to members of our society. When an American approaches her employer, her government, or her fellow citizens for accommodation or for redress, does the law assume, as Jean-Jacques Rousseau might have, that she is a blank slate? Or does the law presume that Americans have human qualities: family relationships, mental and physical abilities, personality, cultural attachments, and as in this case, religious belief? It is simple anthropological fact that most human beings have religious beliefs and a religious identity of one sort or the other. It is also simple fact that human beings carry that identity with them into the workplace. If the law is to properly order human relationships, it must take those facts into account. The law may not assume that people are irreligious unless proven otherwise, and it should not assume that the workplace is a religion-free zone.

Yet that is precisely what the Tenth Circuit would have federal courts do. Unless an employee makes a formal declaration of her religious affiliation or exercise, the employer can assume a lack of religious identity and draw a stark line between religious activity and commercial activity. This is wrong in at least three respects. First, it elevates form over substance, allowing employers to disregard obvious evidence of religious exercise in the workplace and thereby evade their Title VII obligation to provide reasonable accommodation. Second, as noted above, the Court's reasoning adopts an erroneous assumption that employees are nonreligious unless they prove otherwise, ignoring the reality of the human condition. Third, the Court's analysis contravenes basic principles of law and political philosophy that undergird our entire system of free governance, contributing to the marginalization of religion in public life.

In issuing its ruling, this Court should reject the Tenth Circuit's false assumptions and construe Title VII in a manner that recognizes the religious nature of human beings and the important role that religion plays in society, including the workplace.

BACKGROUND

This case includes evidence that Respondent Abercrombie & Fitch Stores, Inc. violated Title VII of the Civil Rights Act of 1964 by blatantly discriminating against Samantha Elauf because of her religion. Elauf is Muslim and, whenever in public, wears a headscarf as a "reminder of her faith" and as a religious expression of modesty. Pet. App. 95a. Title VII requires relatively little of employers confronted with employees wishing to engage in religious exercise. Employers may not treat employees differently because of their

religion, 42 U.S.C. § 2000e-2 (a)(1), and they must "reasonably accommodate" the religious exercise, although only if accommodation can be made without "undue hardship" to the business, 42 U.S.C. § 2000e(j).

Abercrombie's business is selling clothes, and in their own attire, Abercrombie's floor employees are asked to "model" the company's "look." Pet. App. 97a. Among other things, this "Look Policy" forbids Abercrombie's "models" from wearing hats. Pet. App. 99a. But the hat policy has exceptions. Indeed, since 2001, exceptions for religious headscarves have been made by Abercrombie at least eight or nine times in different parts of the country. Pet. App. 104a. Yet Abercrombie purposely refused to consider a similar accommodation for Elauf.

When Elauf applied for the job as a floor model, she was interviewed by the store's assistant manager, Heather Cooke. Cooke "believed Elauf was a good candidate for the job" and, on her original "rating sheet," gave an interview score that would have resulted in Elauf being hired. Pet. App. 98a, 101a. Cooke delayed the hiring only because she was uncertain whether Elauf's headscarf violated the Look Policy. The store's head manager was also uncertain, so Cooke approached her District Manager, Randall Johnson.

According to Cooke, Johnson told her "that employees were not allowed to wear hats at work, and that if Elauf wore the headscarf, then other associates would think they could wear hats at work" as well. Pet. App. 99a. When Cooke explained her belief that Elauf wore the scarf for religious reasons, Johnson was scornfully indifferent: "'[S]omeone can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them.'" *Ibid.* When Cooke

responded that Elauf was probably "Muslim, and that [Islam] was a recognized religion," Johnson still insisted that Elauf could not be hired.[2] Pet. App. 100a. Following this consultation with Johnson, Cooke threw out her original rating sheet and filled out a new form so it appeared that Elauf was not qualified for the job. Pet. App. 102a.

"Those facts, if found by a jury, smack of exactly the religious discrimination that Title VII prohibits." Pet. App. 87a (Ebel, J., dissenting in part). Although Abercrombie's managers knew that Elauf was likely Muslim and assumed that Elauf wore the headscarf for religious reasons, they chose to alter her interview scores rather than accommodate her religion, even though other stores had made numerous exceptions, apparently with no "undue hardship" on Abercrombie's business. And Johnson's "paint themselves green" comment further exhibited animosity toward religious accommodations, implicitly castigating religious employees as erratic and unprincipled.

Yet despite this evidence of discrimination, the Tenth Circuit ruled against Elauf on a technicality. Because Elauf never "explicitly" stated the headscarf was religious and never "explicitly" claimed that her religion forbade her from removing it to comply with Abercrombie's policy, the Court held that she could not prevail on her claims of religious discrimination. Pet. App. 72a.

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[2] Randolph later testified he was aware at the time that "some Muslim women wear head scarves," and he agreed that "[Elauf] would have been a good candidate to hire * * * except for the head scarf." Pet. App. 101a.

ARGUMENT

I. The Tenth Circuit's Ruling Gives Shelter to Blatant Religious Discrimination.

Although Title VII does not expressly include a "notice" requirement, courts impose the common-sense requirement that an employer cannot be liable for failing to accommodate an employee's religious exercise of which it is unaware. See, *e.g.*, *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010) (listing requirements of prima facie Title VII case); see also EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008) (imposing notice requirement). The Tenth Circuit's exceedingly formalistic interpretation of that notice requirement, however, imposes an unreasonably strict standard on employees—especially new applicants—and unnecessarily gives employers room to engage in blatant religious discrimination.

In a series of pronouncements, the Tenth Circuit's opinion successively narrows the protection that Title VII affords religious employees. First, despite Abercrombie's actual knowledge that Elauf was *probably* wearing the headscarf for religious reasons, the Tenth Circuit held that Abercrombie had no duty to accommodate her because she herself had never "explicit[ly]" told Cooke that the headscarf was a religious article. Pet. App. 29a ("[O]rdinarily the applicant or employee must initially provide the employer with *explicit* notice of the conflicting religious practice and the need for an accommodation for it." (emphasis added)). According to the court, notice through observation is insufficient, it must be explicit, with the employee as the direct source. Pet. App. 46a.

Second, the court held that even if notice could be satisfied through an employer's observation or from a source other than the employee, Elauf still would not prevail. Pet. App. 39a. "That is because such notice would need to be based on the employer's particularized, *actual* knowledge of the key facts that trigger its duty to accommodate." *Ibid.* In other words, although Cooke had significant reason to *believe* Elauf was Muslim and wore the headscarf for religious reasons,[3] the court concluded that belief alone is insufficient to trigger Title VII's protections. The notice must be certain.

And in a final narrowing of the Title VII right, the court held that even certain notice of a religious conflict, explicitly from the employee, would be insufficient unless the employee also confirmed that the religious exercise was "inflexible" and could not be set aside for purposes of employment. Pet. App. 23a.

The facts of this case alone are sufficient to show that the Tenth Circuit's restrictive ruling unnecessarily burdens employees in a manner that creates opportunities for employers to evade responsibility for blatant discrimination. Here, Elauf simply did not know—and, as a new job applicant, had no real way to know—that Abercrombie's "Look Policy" prohibited headwear. Pet. App. 97a. The Tenth Circuit's ruling thus deprived her of Title VII's protections through no fault of her own.

Cooke and Johnson, on the other hand, both knew that Elauf's headscarf was technically a violation of

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[3] Cooke's belief was based on her having observed Elauf regularly wearing the scarf. Pet. App. 98a. Cooke was also aware that Elauf was close friends with another Abercrombie employee who Cooke knew to be Muslim. Pet. App. 7a.

company policy and that Elauf was probably wearing it for a religious purpose. In that circumstance, there is no reason why Abercrombie should have been excused from its minimal duty under Title VII not to engage in religious discrimination, even if it was not entirely certain about Elauf's beliefs. Yet the Tenth Circuit's ruling callously ignored that Elauf would have been hired but for Johnson's apparent antipathy toward religious exercise in the workplace.

Of course, a plaintiff must show that her employer has some level of notice, but *any* notice of a potential religious conflict should trigger the employer's duty not to discriminate on religious grounds. The Tenth Circuit's hypertechnical requirement that notice counts only if it comes directly from the employee and explicitly identifies an inflexible religious exercise serves no purpose other than to irrationally limit the scope of Title VII's protections.

The Tenth Circuit's repeated concern that employers would have to respond to more ambiguous indicia of religion by prying into their employees' religious beliefs, see Pet. App. 24a, 41a-42a, 53a-54a, is entirely unfounded. If an employer perceives a potential conflict, it would merely need to identify the work requirement for the employee and inquire whether the employee could satisfy it. In contrast, under the Tenth Circuit's ruling, employers could limit access to information and use evasion or even intimidation to prevent or discourage employees from communicating sufficiently to meet the Tenth Circuit's heightened notice standard, even when the employer already has sufficient notice of the religious conflict.

Nor is the Tenth Circuit's ruling limited to the context of religious discrimination. A female job applicant

who appeared to be expecting a child but had not expressly stated that fact could be dismissed simply because the employer feared she might be pregnant and thus unable to perform certain job duties without accommodation. Cf. *Young* v. *United Parcel Service, Inc.*, No. 12-1226 (argued Dec. 3, 2014) (considering work accommodations for pregnant employees). Similarly, individuals with obvious disabilities could be subjected to discrimination without recourse, if the employer simply showed that the applicant had failed to explicitly identify the disability.

As relevant here, the purpose of Title VII is to prevent religious discrimination. The Tenth Circuit's ruling has the opposite effect by potentially shielding employers from liability even for blatant discrimination.

II. The Tenth Circuit's Ruling Ignores the Reality of the Human Condition.

The Tenth Circuit's ruling essentially adopts a presumption that employees are not religious unless they affirmatively and verbally prove otherwise. But this presumption has it exactly backwards: Americans—indeed, *humans*—are overwhelmingly religious.

Religion is not only "primordial in human history and present in * * * all human civilizations," but has also proven "to be incredibly resilient, incapable perhaps of being destroyed or terminated," even by powerful states determined to extinguish it.[4] It is "irre-

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[4] *Homo Religiosus? Debating the Naturalness of Religion and the Anthropological Foundations of Religious Freedom* (Timothy Samuel Shah, ed.) (forthcoming 2016) (manuscript at 24, on file with authors and *amicus*) (*Homo Religiosus*).

pressible, widespread, and seemingly inextinguishable," at least in part, because human beings have "'innate features'" and exist in an environment that "'predispose and direct them toward religion.'"[5]

For example, almost all human knowledge is ultimately founded on belief. "In the end, none of us can find and build upon certain, indubitable truths that are not dependent upon more basic, presupposed beliefs."[6] This "*epistemic condition*," in which "[r]eligious believing is * * * not at odds or variance with the * * * trajectory of all human believing" "helps tend people * * * toward religion."[7] Our "*existential condition* also lends itself to the tendency toward religious engagement," imposing questions about the source and meaning of life.[8] And our "*moral condition*"—the "inescapabl[e]" need for making "'strong evaluations'" with significant consequences—also pushes us to seek a higher source of ultimate right and wrong.[9]

It is no surprise then that eight out of ten people across the world identify with a particular religion. According to studies, 84% of the global population is not

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[5] *Id.* (manuscript at 42-43, 9).

[6] *Id.* (manuscript at 31).

[7] *Ibid.*

[8] *Id.* (manuscript at 32).

[9] *Ibid.*

only religiously affiliated,[10] but also considers "religion an important part of their daily lives."[11]

America is no exception. 84% of Americans have a religious affiliation.[12] And they hold their religious beliefs strongly. In a 2013 study conducted by Gallup, respondents were asked, "How important would you say religion is in your own life?" 56% said "very important" and 22% said "fairly important."[13] Around 57% of Americans "say that religion can answer all or most of today's problems."[14]

America's religiosity is also increasing. Between 2008 and 2013, there was an increase in the percent-

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[10] Pew Forum on Religion and Public Life, The Global Religious Landscape (2010), *available at* http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/ (last viewed Dec. 9, 2014).

[11] Steve Crabtree, "Religiosity Highest in World's Poorest Nations." (August 31, 2010), *available at* http://www.gallup.com/poll/142727/religiosity-highest-world-poorest-nations.aspx (last viewed Dec. 9, 2014).

[12] Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (last viewed Dec. 9, 2014).

[13] Gallup, Religion (2013), *available at* http://www.gallup.com/poll/1690/religion.aspx (last viewed Dec. 9, 2014).

[14] Frank Newport, "Majority Still Says Religion Can Answer Today's Problems." (June 27, 2014), *available at* http://www.gallup.com/poll/171998/majority-says-religion-answer-today-problems.aspx (last viewed Dec. 9, 2014).

age of Americans who are very or somewhat religious.[15] The number of "very religious" Americans rose in almost every state.[16] And Oklahoma, where Abercrombie engaged in the blatant religious discrimination at issue here, tops the charts: Oklahoma is one of the top 10 most religious states in the country, with 75% of respondents stating that religion is an important part of their daily life.[17]

The studies are clear: a majority of Americans say that not only is religion important, but also that it is intertwined in their daily life, including their work. They conclude that "religion is relevant in the workplace" and that religious accommodation results in "improved morale."[18] "People of all faiths * * * have religious needs that require a response in the workplace," and they regularly seek accommodations for a variety of religious practices, such as "wearing facial hair or clothing that is part of their religious identity," and not working on "Sabbath observances or a religious holiday."[19] Thousands of employees bring claims

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[15] Frank Newport, "Mississippi Most Religious State, Vermont Least Religious." (Feb. 3, 2014), *available at* http://www.gallup.com/poll/167267/mississippi-religious-vermont-least-religious-state.aspx (last viewed Dec. 9, 2014).

[16] *Ibid.*

[17] Frank Newport, "State of States: Importance of Religion" (Jan. 28, 2009), *available at* http://www.gallup.com/poll/114022/state-states-importance-religion.aspx (last viewed Dec. 9, 2014).

[18] Tanenbaum, What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion (Mar. 2013), *available at* https://tanenbaum.org/publications/2013-survey/ (last viewed Dec. 9, 2014).

[19] *Ibid.*

each year; in 2013 alone, $11.2 million in monetary benefits were paid in religious discrimination cases.[20]

These statistics show that it is only fair to deem the notice requirement satisfied when an employer has *actual knowledge*, even if it is just actual knowledge of a *potential* religious requirement. Americans are religious, and they seek to carry out their religion in their daily lives, including their work. Employers should expect to encounter religion in their workplaces, and the law should not allow them to conduct real discrimination against employees with real religious requirements simply by claiming they weren't certain that religion was at issue. The workplace "need not become a religion-free zone." *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1842 (2014) (Kagan, J., dissenting). See also *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981) (employees should not be "put to a choice between fidelity to religious belief or cessation of work").

III. The Tenth Circuit's Ruling Ignores the Important Role that Religion Plays in American Society, Including in the Workplace.

From its earliest foundations, our nation has embraced the idea that religion is an inherent part of the human condition. The Declaration of Independence's defense of the American Revolution proceeded from the "self-evident" truth that all persons "are endowed *by their Creator* with certain unalienable rights." Declaration of Independence, para. 2 (emphasis added).

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[20] This number does not include monetary benefits obtained through litigation. U.S. Equal Employment Opportunity Commission. Religion-Based Charges, FY 1997 – FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm (last viewed Dec. 9, 2014).

Since that time, this Court has recognized "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). Simply stated, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).

This embrace of religion encompasses "two concepts," both the "freedom to believe" and the "freedom to act." *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 303 (1940). Thus, not only do we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary," *Zorach*, 343 U.S. at 313, but our Constitution also "affirmatively mandates accommodation, not merely tolerance, of all religions," *Lynch*, 465 U.S. at 673. Thus, our laws do not assume that citizens will engage in religious exercise only at home or in places of worship, but rather anticipate that religion will manifest in all aspects of American life, including the workplace. *See id.* (noting that "respect[ing] the religious nature of our people" and accommodating "all forms of religious expression" are among "the best of our traditions."); *see also* International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (recognizing that religious beliefs are protected "individually or in community with others and in public or private," "in worship, observance, practice, and teaching").

This embrace of religion as an inherent aspect of human life serves two critical purposes in our democracy. First, acknowledging that religion has roots deep within the human race suggests that efforts to "restrict or suppress the religious lives of human persons"

would violate an "existentially innate part of human personhood."[21] It also reinforces an understanding that "states will only ever be able to significantly restrict religious freedom in their societies by resorting to highly coercive and violent, and thus illegitimate, and likely reprehensible, means," thereby stigmatizing and discouraging such efforts.[22]

Second, securing a robust role for religion in public life facilitates the general morality that has always been deemed essential to the preservation of our free society. As early as 1778, the Continental Congress expressed its conviction that "true religion and good morals are the only solid foundations of public liberty and happiness." 12 *Journals of the Continental Congress* 1001 (Worthington Chauncey Ford ed., 1908) (Oct. 1778). Benjamin Franklin explained that "only a virtuous people are capable of freedom," because "[a]s nations become corrupt and vicious, they have more need of masters." Letter from Benjamin Franklin to the Abbés Chalut and Arnaud (April 17, 1787) *in* 9 *The Writings of Benjamin Franklin*, at 569 (Albert Henry Smyth ed. 1906). John Adams concurred with his well-known declaration that "we have no government armed with power capable of contending with human passions unbridled by morality and religion. * * * Our Constitution was made only for a moral and religious people." Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of

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[21] *Homo Religiosus* (manuscript at 34).

[22] *Ibid.* One need only glance at many conflict spots around the world—Syria, Iraq, Burma, China, Nigeria, and North Korea, among many others—to see that religious belief is not an issue that can simply be wished away. It must be met on its own terms.

Massachusetts (Oct. 11, 1798), *in* 9 Works of John Adams, at 229 (Charles Francis Adams ed. 1854).

Alexis de Tocqueville clarified that it was not the specific creeds, modes of worship, or deities of any one religion that were essential to filling this role. It was simply that religions generally "agree in respect to the duties which are due from man to man" and "preach the same moral law." Alexis de Tocqueville, I *Democracy in America* 326 (Henry Reeve trans., 1899) (1835). Tocqueville knew that religion had a role in preserving American democracy by promoting voluntary compliance with the law. "[R]eligion exercises but little influence upon the laws and upon the details of public opinion, but it directs the manners of the community, and by regulating domestic life it regulates the State." *Id.* at 372. And although it is human nature, and not any particular concept of the Divine, that law must take into account, our nation's historical embrace of religion in public life has always had, and continues to have, an important function in fostering the general morality that is essential to preserving our free society.

* * *

Our constitution and laws not only assume, but depend upon, religion playing a robust role in society. The Tenth Circuit's ruling rejects that perspective by permitting employers to ignore evidence of religious belief, and even discriminate against employees on the basis of religion unless the employees explicitly assert that they are protected under Title VII. Such an approach marginalizes religion, denying the critical role it plays in society.

CONCLUSION

For the foregoing reasons, the decision below should be vacated.

Respectfully submitted.

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